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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 404

SOUTHERN MINERALS CORPORATION, *Petitioner*,

v.

JAY SIMMONS, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit, and

BRIEF IN SUPPORT THEREOF

SOUTHERN MINERALS CORPORATION,
By BIRGE HOLT,
Corpus Christi, Texas;
By DAN MOODY,
Austin, Texas;
By RALPH R. WOOD,
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ALPHA LAW BRIEF CO., HOUSTON, TEXAS

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

---

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The petition of Southern Minerals Corporation for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit respectfully shows to this Honorable Court:

I.

Summary Statement of the Case

On March 24, 1930, T. M. Harrell and wife, as lessors, executed to R. D. Kelly, as lessee, an oil and gas lease upon 333 acres of land in Nueces County, Texas (R. 385). Houston Oil Company of Texas (hereinafter called Houston), having become owner of said oil and gas lease, on April 5, 1932, for a recited consideration of $177,750.00, assigned to Southern Alkali Corporation (hereinafter called Southern Alkali) all its right, title and interest in *six oil* and gas leases, including the Harrell lease, covering *in excess of 1300 acres,* **"insofar as the same cover the gas rights * * * together with three certain gas wells now completed thereon."** The assignment contained no reservation or exception. It was, however, made "subject to the following specific understanding and agreement, viz.:

> "Should Southern Alkali Corporation, or its assigns, as a result of its operation on said leases, or either of same, discover oil in any well drilled on said lands, said Southern Alkali Corporation agrees to set casing in said well and make a thorough and workmanlike test thereof with a view to bringing in an oil well. Should said well, when completed, produce as much as fifty (50) barrels of oil per day for ten (10) consecutive days, the Houston Oil Company of Texas, may at its option, within forty (40) days after completion, take over and own said well by paying to Southern Alkali Corporation the cost actually incurred in drilling and equipping said well, exclusive of any overhead charges * * * ."
>
> "*Should Houston Oil Company of Texas, as a result of its operations, discover gas in any well drilled on said land in any well drilled by the Houston Oil Company of Texas in an unsuccessful effort to complete a commercial oil well, the said Houston Oil Company of Texas agrees to complete said well as a gas well; and should*

said well, when completed, produce merchantable gas in marketable quantities, the Southern Alkali Corporation may, at its option, within forty (40) days after the completion, take over and own said gas well by paying to the Houston Oil Company of Texas the cost actually incurred in drilling and equipping said gas well, exclusive of any overhead charges, and exclusive of any drilling costs below the producing horizon. Provided, however, it is distinctly understood and agreed that the Houston Oil Company of Texas shall not have the right or privilege of completing more than five (5) such gas wells. * * *" (Italics added.) (R. 386, 389-396.)

The clauses just quoted will be referred to hereafter as the contract provisions of said assignment.

On September 15, 1933, Southern Alkali assigned and conveyed to Petitioner, Southern Minerals Corporation, all the leasehold *gas rights* thus acquired by it from Houston (R. 386-396).

On January 6, 1938, six years after Houston had assigned its gas and gas rights to Southern Alkali, Houston assigned to Respondents, Simmons and Webb, the leasehold *oil rights* in *a portion* of the 333-acre Harrell lease and a *portion* of the Lawrence lease, two of the six leases covering 1300 acres of land included within such previous assignment of gas and gas rights to Southern Alkali (R. 386, 399, 403). Such assignment recited in substance:

"Whereas First Party is the owner of the *oil rights* under an oil and gas lease from Harrell and wife to Kelly * * * ; and whereas First Party is the owner of the *oil rights* under an oil and gas lease from Lawrence and wife to Harrell and Harrell to Kelly * * * ; and whereas it is the intention of this instrument for First Party to assign to Second Parties the *oil rights* under said existing leases *insofar as they cover a portion of the above described lots,* in consideration of the drilling of certain wells and the payment of *overriding royalty* as herein

provided * * * , Houston Oil Company does hereby bargai[illegible] sell, transfer and assign, subject to the performanc[illegible] the obligations here imposed, unto Jay Simmons an[illegible]. Webb, their heirs and assigns, all of its rights u[illegible]d existing leases in so far as same cover 13/16ths w[illegible]king interest in the *oil rights* in and to Lots 23, 24 and 27 except the east 20 thereof, Lot 20 and part of Lot 13; * * * it is understood that it is the intention of the Parties of the First Part that this assignment of *oil rights* shall assign to Second Party all of the rights under the existing oil and gas leases *except the rights of the Southern Alkali Corporation and/or Southern Minerals Corporation as evidenced by contract and assignment of gas rights of April 5, 1932,* * * *, to which instrument and all the terms thereof reference is hereby made as if same were fully copied herein. * * * As further consideration for this assignment Houston Oil Company reserves an overriding royalty of 1/8th *in oil*, that is 1/8th of 8/8ths of the value or proceeds of the *oil* which shall be actually produced." (Italics added.) (R. 386, 399-403.)

In no sense does such instrument purport to assign any gas rights. In the granting clause and throughout the instrument, it will be noted, reference is made solely to "*oil rights.*"

On July 5, 1938, the well with respect to which the immediate controversy arises, was completed by Respondents, Simmons and Webb, on the Harrell land. The well since completion has produced and is capable of producing great quantities of gas.

On or about August 9, 1938, under a written contract dated July 30, 1938 (R. 420-421), Respondents, Simmons and Webb, began selling and delivering gas from such well to Respondent, Southern Coast Corporation (R. 188) for fuel purposes and for jetting oil wells in Corpus Christi Field (R. 189), an entirely different field from that in which the well in controversy was situated. In such operations Respondents, Simmons and Webb, to the time of trial in the District

Court, had produced from said well and sold to Respondent, Southern Coast Corporation, approximately one half billion cubic feet of gas (R. 189), and, as an incident to such gas withdrawals, had obtained, appropriated and sold 19,126.33 barrels of hydrocarbon liquids (R. 448-453), a very substantial portion of which resulted from condensation of gas existing as such in the producing sand (R. 102, 115, 144, 145, 283-288, 327-329, 459).

Alleging its ownership of gas in place and, in consequence, its ownership of the liquid condensates therefrom, Petitioner, by suit instituted in the District Court for the Southern District of Texas, sought to enjoin such appropriation and sale of its gas as a continuing trespass upon its real property right and estate therein and to recover damages for gas and products of gas theretofore taken by Respondents (R. 15-21). To Petitioner's suit Respondents, by their answer, asserted (R. 23): That the well in controversy is an oil well, and that as a result Respondents are vested with *absolute* title (as distinguished from a mere right of reasonable user) to gas produced therefrom with oil, and that accordingly they had the right to sell and dispose of the gas; but in the alternate, if the well is a gas well, Respondents are vested with all the rights of Houston and drilled the well in compliance with said contract provisions (giving to Houston the right to drill five gas wells and take the products therefrom upon failure of Southern Alkali to exercise the option given it), and, Petitioner having failed to take over the well in forty days, Respondents are entitled to all the products thereof (R. 24, 25).

It thus appears that the parties join issue as to their respective rights in gas from such well whether it be an oil well *or* a gas well. If the well is an oil well, the principal question of law is whether Respondents, owners of the oil rights only, are entitled to take and sell as their own the gas produced

with the oil, and thus defeat Petitioner's vested estate in the gas, or are limited to a mere right of user of the gas as an instrumentality in producing their oil. If the well is a gas well, the principal questions of law are whether Respondents have succeeded to Houston's rights under the contract provisions, whether the well in controversy was drilled by Respondents in compliance with the conditions of such contract provisions, and whether Petitioner has forfeited its title to the gas from the well.

After full trial upon the merits, the District Court rendered judgment denying Petitioner any relief (R. 32). That Court wrote no formal opinion, but filed Findings of Fact and Conclusions of Law (R. 33-46), finding and concluding in substance: (1) That the well *in fact* is an oil well (R. 41, 42, 45 and 46), and that Respondents, as a matter of law, were *owners* of the gas produced from said well with oil, with the consequent right to *sell* and *dispose* of such gas (R. 43-46), despite the fact that Petitioner was owner of gas in place without exception or reservation and had no right to take over any oil well completed by Respondents. (2) That the right of Houston, under the contract provisions of its assignment to Southern Alkali, to complete gas wells up to five in number and take the products therefrom in the event Southern Alkali, or its assigns, failed to take over such wells, was assignable and was, in fact, assigned (by the assignment above referred to) by Houston to Respondents, Simmons and Webb; and *if* the well in question were a gas well, the products of the well were property of Respondents, Simmons and Webb, and Petitioner could not complain of the production and sale of gas therefrom because Petitioner had failed to take over the well within the forty-day period provided, and had waived and was estopped to assert such right (R. 33-41). The District Court made no finding of fact and expressed no conclusion of law as to whether Respondents had

complied with the conditions upon which their right to complete the well as a gas well depended.

On appeal the Court of Appeals, in affirming the judgment of the District Court, *assumed*, without definitely finding as a fact, "that this is *not* a well 'producing as much as 50 barrels of oil per day' but is a well producing merchantable gas in marketable quantities," and, accordingly, assumed the well is a *gas well* as described in the contract provisions of the assignment from Houston to Southern Alkali. Upon such assumption the Court of Appeals held that the right of Houston to complete five such gas wells was assignable and was, in fact, assigned by it to Respondents, Simmons and Webb; that Petitioner had failed to exercise its option to take the well over; and that consequently the products thereof belonged to Simmons and Webb. JUDGE HUTCHESON dissented from the view of the majority that the right of Houston to complete five gas wells was assigned to Respondents, Simmons and Webb, by the assignment dated January 6, 1938, and upon that basis thought the case should be reversed and Petitioner granted the relief it sought.

Notwithstanding the District Court found as a fact that the well is an *oil well* as defined in the contract provisions of the assignment to Southern Alkali (R. 41, 42, 44, 45 and 46), the Court of Appeals did not expressly reject that finding of fact and substitute its own contrary finding therefor, but merely "assumed," without definitely finding as a fact, that the well is a *gas well* as therein defined, and then proceeded to dispose of the rights of the parties upon such "assumption." The Court of Appeals expressed no opinion upon, but left to surmise and speculation, the rights of the parties in gas from the well in question if, *as found as a fact by the District Court*, the well is in fact an "oil well." By this anomalous procedure the Court of Appeals, without accepting or rejecting the finding of the District Court that the well in controversy is an *oil*

well, adjudicated the rights of the parties upon the *hypothesis* that such well is a *gas well,* but failed and refused to determine the respective rights of the parties upon the contrary *finding* by the District Court that the well is an oil well.

The Court of Appeals further held in effect that Petitioner having alleged that "Simmons and Webb completed the well 'in an unsuccessful effort to produce oil,' " was precluded *because of this pleading* from contending that Respondents had not complied with the conditions of the contract provisions of the assignment from Houston to Southern Alkali limiting Houston's right and duty to complete the well in question as a gas well, notwithstanding the fact that Respondents, by their undisputed testimony upon the trial in the District Court, confessed that they had not complied with such conditions.

The opinion of the Court of Appeals is reported in 111 Fed. (2d) 333 (R. 456). Petition for rehearing was overruled without further opinion, or statement of findings of fact, or conclusions of law (R. 478).

II.

Jurisdiction

Judgment of the Court of Appeals is dated April 25, 1940 (R. 471). Petition for rehearing was filed on the 14th day of May, 1940 (R. 472), within twenty-one days from the date of the judgment as permitted by the rules of the Circuit Court of Appeals for the Fifth Circuit (Rule 29), and was denied June 11, 1940 (R. 478). Petition for writ of certiorari was filed in this Court within three months from the date upon which the petition for rehearing was overruled. Jurisdiction of this Court is thereby timely invoked under Sec. 240(a) of the JUDICIAL CODE, as amended (Sec. 347(a), Title 28, U.S.C. A.), and Rule 38(5b) of this Court, and Sec. 240, 8(c) of the

JUDICIAL CODE, and Sec. 350, Title 28, U.S.C.A. NATIONAL LABOR RELATIONS BOARD v. MACKAY RADIO & TELEGRAPH CO., 304 U.S. 333, 343-344; UNITED STATES v. SEMINOLE NATION, 299 U.S. 417, 419-420; ROGERS v. HILL, 289 U.S. 582, 586-588; CITIZENS BANK OF MICHIGAN CITY, IND., v. OPPERMAN, 249 U.S. 448, 449; TEXAS & PACIFIC RAILWAY CO. v. MURPHY, 111 U.S. 488, 489; ROBERTSON AND KIRKHAM, Jurisdiction of the Sup. Ct. of the U. S., Sec. 354, p. 720.

Questions Presented

(1) Did the Court of Appeals properly decide the issues before it by *assuming*, but not finding as a fact, that the well in controversy is a gas well, and by failing and refusing to determine the rights of the parties to gas produced therefrom if the well, as expressly found by the District Court, is in fact an oil well?

(2) Do Respondents, as owners of the leasehold oil rights in the Harrell land, also own gas produced from a well drilled by them which produces both oil and gas, notwithstanding the leasehold gas rights in such land were vested in Petitioner by prior conveyance, or do they have only the appurtenant right of reasonable user of such gas as a lift of the oil?

(3) Did the Court of Appeals correctly hold that Petitioner, having alleged that Respondents Simmons and Webb, "in an unsuccessful effort to produce oil from said land, drilled, and on or about July 5, 1938, completed a well thereon producing and capable of producing great quantities of gas," was precluded *by its pleadings*, despite the express provision of Rules 15 (b) and 54 (c) of the RULES OF CIVIL PROCEDURE, from contending that Respondents had not discovered gas therein "in an unsuccessful effort to complete a commercial oil well," within the terms of the contract provisions, even

though that fact was true and had been conclusively established by judicial admissions made by Respondents at the trial in the District Court?

(4) Since the right of Houston, under the contract provisions of its assignment to Southern Alkali, to complete five gas wells and to take the products therefrom upon the failure of Southern Alkali, or its assigns, to take over said wells, was expressly limited to those instances in which Houston "as a result of its operations discover gas in any well drilled by Houston Oil Company of Texas in an unsuccessful effort to complete a commercial oil well," did the Court of Appeals correctly hold that Respondents, Simmons and Webb, had complied with such conditions simply because "the drilling" of the well in controversy "was continued beyond the gas strata," in which it was completed, "in a search for oil still lower, when the drill was twisted off in the hole," in the light of the undisputed testimony of Respondents that a good oil well could have been completed in three or four shallower sands and that the well in question was not completed "in an unsuccessful effort to complete a commercial oil well" as was required by the contract provisions of such assignment?

(5) Was the right of Houston to complete five gas wells under the contract provisions of its assignment to Southern Alkali, assignable by it to Respondents, Simmons and Webb?

(6) Was the right of Houston to complete five gas wells intended to be, and was it, in fact, assigned by Houston to Respondents, Simmons and Webb, by the assignment dated January 6, 1938, as held by the majority of the Court of Appeals, JUDGE HUTCHESON dissenting?

(7) Did the Court of Appeals correctly hold that the rights of Petitioner under the contract provisions of the assignment by Houston to Southern Alkali defining Petitioner's right to take over a gas well drilled by Houston are to be governed by rules relating to simple options, of which time is the

essence, placing upon Petitioner the burden of showing that it had exercised the option within the time therein provided, or are such rights to be governed by the rules relating to provisions for forfeiture, placing upon Respondents the burden of showing strict compliance with all prerequisites to accomplish such forfeiture?

Reasons for Granting Writ

(1) In disposing of the issues before it, the Court of Appeals, by *assuming*, but not finding as a fact, that the well in controversy is a gas well, and by failing and refusing to determine the rights of the parties to gas produced therefrom if the well, as expressly found by the District Court, is in fact an oil well, has so departed from the accepted and usual course of judicial procedure as to call for the exercise by this Honorable Court of its power of supervision. It was the duty of the Court of Appeals, particularly upon timely request by Petitioner in its petition for rehearing, to state in writing its findings of fact and conclusions of law with respect to the rights of the parties in gas from the well in question if such well were, as found by the District Court, in fact an oil well, or to state the reasons for its failure to do so.

There is in issue not only (1) Petitioner's rights in gas from the well in question if it be a gas well, but (2) its rights in gas from such well if it be an oil well. The case therefore, presents only two ultimate and opposing fact questions; the well is a gas well *or* it is an oil well. It follows that if the Court of Appeals intended to define and adjudicate the nature and extent of Petitioner's legal rights and deny it the relief it sought, *upon a fact finding*, it was incumbent upon it, in the accepted and usual course of procedure (1) to find whether the well was *in fact* an oil well *or* a gas well, and (2) state its legal conclusions based thereon. Accordingly a full,

comprehensive and proper disposition of the case by the Court of Appeals upon a *finding*, rather than upon an *assumption*, of fact required of it, in deference to the rights of Petitioner, an unequivocal statement either approving the finding of the District Court that the well is in fact an oil well or reversing that finding and substituting therefor its own finding that the well is a gas well, and a definite statement of the legal conclusions reached upon the fact so approved or found by it.

On the other hand, if the Court of Appeals intended to leave the fact question undetermined and to dispose of the case solely upon questions of law it was incumbent upon it to consider and expressly determine the respective rights of the parties, as a matter of law, not only upon the hypothesis that the well is a gas well but also upon the hypothesis that it is an oil well. This the Court did not do. It *assumed*, without finding as a fact, that the well was a gas well and decided the case upon that single *assumption*. It expressed no legal conclusions as to Petitioner's right to gas from the well if it be an oil well. It affirmed the judgment of the District Court, apparently without considering Petitioner's right to the relief it sought and its propositions presenting such right in the event such well be an oil well. It made no statement as to its reasons for declining to set out its conclusions with reference to such rights or to pass upon such propositions.

In failing to find as a fact that the well is a gas well or an oil well; in declining expressly to consider Petitioner's rights in gas therefrom if it be an oil well, with no statement as to why such rights were not considered; and, if such rights were considered, in declining to set out its conclusions with respect thereto, the Court of Appeals has deprived Petitioner of specific findings and conclusions to which definite specifications of error might be addressed to this Court for review. In so doing the Court of Appeals deprived this Petitioner of its right

accurately to assign for review before this Honorable Court the findings and holdings of the Court of Appeals upon Petitioner's valuable property rights properly in issue and presented to that court.

In the absence of any statement on the part of the Court of Appeals as to why it did not pass upon Petitioner's asserted rights in gas from the well in question though it be an oil well or as to why it denied plaintiff any relief based upon such rights in the event it did pass thereon, Petitioner is forced to assume that the Court of Appeals either (1) considered that such rights were not in issue and before it, or (2) intended inferentially, by affirming the judgment of the trial court, to hold that if the well be an oil well Respondents *owned the gas* produced therefrom with oil and accordingly Petitioner was without ground for complaint regardless of the relative quantity of gas to oil taken and sold by Respondents therefrom. If the Court thought that the matter was not properly in issue or before it, it should have so announced, stating its reasons therefor. Had it done so, Petitioner could accurately and precisely have presented to this Court for review the correctness of the ruling of the Court in this regard. On the other hand, if the Court intended to hold that Petitioner had no interest in gas produced from the well in question if it produced both oil and gas, such a decision was certainly of such vital importance to Petitioner, to a proper adjudication of the case and to oil and gas jurisprudence as clearly to require the Court to set out its reasons for so concluding in order that its decision might, in due order of procedure, be precisely and accurately presented to this court for review. In short, the Court of Appeals should either have expressly declined to pass upon such rights, stating its reasons therefor, or expressly set out the legal grounds upon which its decision was based. Had it done either Petitioner would not have been deprived of specific findings and conclusions essen-

tial to the exercise of its right of accurate, fair and full review before this Honorable Court; and the effect of the judgment of the Court of Appeals upon Petitioner's valuable property rights in gas from a well drilled by Respondents, and producing both oil and gas, would not be the subject of speculation and uncertainty.

The importance to Petitioner of the implications of such an indeterminate adjudication is clear, and the effect of such judgment may extend beyond the immediate case. Petitioner is the owner of the leasehold gas rights, and Respondents and Houston Oil Company are the owners of the leasehold oil rights in some 1300 acres of land in the immediate vicinity of the well in controversy, all affected by the terms and provisions of the assignment from Houston to Southern Alkali and the contract provisions therein contained. Accordingly if the opinion of the Court of Appeals should be construed, by implication, to hold that if the well in question produces some oil as well as gas, Petitioner has no title to gas therefrom but the Respondents are vested with title thereto, then its effect may and probably will be to adjudicate that Petitioner has no title to or right in gas from *any other well* producing oil and gas drilled by Respondents or Houston on the lands affected by the assignments. Such judgment, if given that effect, will permit the Respondents, and accordingly Houston, to operate any well producing both oil and gas, and completed by them, in any manner they see fit and to take and appropriate the gas therefrom regardless of the relative quantity of gas to oil produced. As a result of such decision, if so interpreted, the gas reserves of Petitioner might and probably will be entirely dissipated. Under the contract provisions referred to, Petitioner can protect its right to gas from a gas well but it cannot do so with respect to a well producing oil and gas for it has no right to take over such a well. It is apparent, we think, that such valuable property rights of Petitioner should

not be left to speculation and doubt nor Petitioner's full right of review before this Court embarrassed by any such uncertainty and indefiniteness of decision by the Court of Appeals.

In its petition for rehearing, Petitioner pointed out the possible effect of the opinion and judgment rendered by the Court of Appeals upon its substantive rights, and requested the court to make specific findings and conclusions with respect to the matters here presented (R. 472). In overruling the Petition for rehearing without further statement, opinion or finding, the Court of Appeals declined such request, thus leaving the rights of the parties to gas from an oil well undetermined except perhaps by implication, with the attendant consequences pointed out above; and the case has been decided on incomplete fact assumptions rather than upon complete findings of fact.

(2) If the Court of Appeals held inferentially (by affirming the judgment of the District Court) that Respondents, Simmons and Webb, owners *only* of the leasehold oil rights, also *own* gas produced with oil from the well in question though the leasehold gas rights in the land from which said well produces are vested in Petitioner, the Court of Appeals has decided a question of particular and outstanding importance to the oil and gas industry, probably untenable and in conflict with the established law, and has decided an important question of local law contrary to the holdings of the Supreme Court of Texas. GUFFEY v. STROUD (Tex. Com. App., opinion adopted, Tex. Sup. Ct.), 16 S.W. (2d) 527.

The question here involved—the determination of the respective rights of the leasehold owner of oil rights and the leasehold owner of gas rights *in gas* from an oil well —is not only of vital importance to the litigants but to the oil and gas industry in general. If, as has been held inferentially by the Court of Appeals, the owner of leasehold

oil rights also owns gas produced from a well completed by him which produces both oil and gas, instead of having the mere right of reasonable user of such gas as a lift of oil, then such owner of the leasehold oil rights, may, upon such holding, entirely dissipate previously vested gas rights and estates. This is true for the reason that if the owner of the leasehold oil rights also owns gas from a well producing both oil and gas, then he may produce, sell and dispose of the gas regardless of the relative quantity of gas to oil produced and without regard to the fact that another is vested with the estate in the gas. Such decision attributes no value to gas and utterly disregards the rights of those vested with title thereto.

At most, owners of leasehold oil rights only, as are Respondents here, have solely a right of user in gas, that is, a right in the nature of an easement to the use of gas as a lift of oil, just as they have the right to the use of surface, water and other essentials to the enjoyment of the oil estate. Such appurtenant right of user no more vests Respondents with ownership of gas than the right of user of the surface and soil vests them with title thereto. Respondents, having only the right of user of gas as an appurtenant to their estate in the oil, must exercise such right reasonably with due regard for the previously vested estate of Petitioner in such gas.

The holding of the District Court, in which the Court of Appeals impliedly acquiesced, that Respondents *owned* the gas produced from such well with oil, with the consequent right to appropriate, sell and dispose of such gas, regardless of the relative quantity of gas to oil produced from said well, is clearly in conflict with the case of GUFFEY v. STROUD, 16 S.W. (2d) 527, by the Texas Commission of Appeals, in which that Court, in an opinion approved by the Supreme Court of Texas, held that the owner of the leasehold oil rights had no title to gas encountered in drilling for oil, but had only the

right to the use of such gas in "*properly*" drilling for and producing oil.

Because of its high gas-liquid ratio or because of the nature of the liquid products, found by the District Court to be "gas-oil" (R. 42), the well in question was reported by Respondents to and by the Railroad Commission of Texas classified as a "gas well producing condensate and/or crude oil" (Exhibits 99-101, R. 427 to 438). The well has at all times been operated as a gas well, the gas therefrom being sold by Respondents Simmons and Webb to Respondent Southern Coast Corporation to be utilized by the latter for the jetting of oil wells and fuel purposes in Corpus Christi Field, an entirely different field from that in which the well is situated. The well having been classified as a gas well, the gas therefrom cannot legally be used as a propelling agency or lift of the oil therefrom and thereafter blown into the air, as might be done had the well been classified by the Commission as an oil well. Instead the well can be operated only for the production of gas, and the liquid products (whether oil or condensates of gas) are but incidental to gas withdrawals.

It follows that Respondents, in operating the well as a gas well and in appropriating and selling the gas to be used for jetting of wells and fuel purposes in another field, are taking from the well in question far more gas than would be legally permitted in the production of oil therefrom. If Respondents are taking more gas from the well than can be *legally* used as a lift of oil therefrom, it must follow that by such excessive withdrawal of gas they are exceeding their right of reasonable use of the gas as a lift of oil. Assuming therefore that the well was upon completion made to produce as much as fifty barrels of oil per day for ten consecutive days by extremely large gas withdrawals and was for that reason an oil well as defined in the contract clauses of the assignment from Houston, it does not follow that

Respondents are making reasonable use of the gas to produce the oil.

Instead they are appropriating and selling the gas for other purposes and obtaining such oil, if any, as the well produces, as an incident to gas production. This they can not do and thus destroy Petitioner's previously vested estate in gas, unless they have title (as distinguished from the right of reasonable user of gas as a lift of oil) to gas from the well. The decision of the Court of Appeals, if construed as inferentially holding to the contrary, is clearly wrong and in conflict with the settled law of Texas as declared in the decision of GUFFEY v. STROUD (Tex. Com. App.), 16 S.W. (2d) 527. Furthermore by the authority of that decision, Petitioner was clearly entitled to an injunction to restrain the appropriation and sale of gas from the well and to judgment in damages for that heretofore taken by Respondents; and the holding of the Court of Appeals that Petitioner is not entitled to such relief is in conflict with the holding in that case.

(3) Petitioner alleged in its complaint (R. 15-21) that Respondents, "Jay Simmons and J. E. Webb, in an unsuccessful effort to produce oil from said land, drilled, and on or about July 5, 1938, completed a well thereon producing and capable of producing great quantities of gas;" and that Respondents are converting large quantities of gas therefrom. Petitioner did not thereby allege the well to be either a gas well or an oil well; it merely alleged, as is uncontradicted in the proof, that the well "is producing and capable of producing great quantities of gas," and sought an injunction restraining appropriation of its property and damages.

In their answer Respondents allege that they are owners of all rights formerly owned by Houston and specifically pleaded in substance that the well in question, if a gas well, was drilled by them in compliance with the contract pro-

visions giving Houston the right to drill five gas wells (R. 24, 25).

Respondent, J. E. Webb, a partner of his corespondent, Jay Simmons, and in charge of the drilling of the well (R. 221), testified upon cross-examination without objection (1) that a good oil well could have been completed in three or four shallower sands, and (2) that Respondents did not discover gas in the well in question "in an unsuccessful effort to complete a commercial oil well" (R. 231-234). This evidence was material only upon the question of whether or not the well in controversy was within the terms of the contract provisions (a matter peculiarly within the knowledge of Respondents); and such evidence was admitted without objection or claim of surprise by Respondents as to proof of fact or as to theory upon which Petitioner was proceeding. There was no claim that any prejudice resulted from the quoted allegation of plaintiff's petition.

Notwithstanding Respondents' confession at the trial that they could have completed the well as a good oil well in any one of three or four shallower sands and that they did not discover gas in the well "in an unsuccessful effort to complete a commercial oil well," the Court of Appeals nevertheless held that Petitioner was precluded because of its *pleading* from asserting the truth of such admission (R. 461).

Such holding is contrary to the intention and meaning of the FEDERAL RULES OF CIVIL PROCEDURE, and is expressly contrary to Rules 15(b) and 54(c) thereof, and is in conflict with other decisions of the Circuit Courts and District Courts with respect thereto. (NESTER v. WESTERN UNION TELEGRAPH CO. (Dist. Ct. So. Dist. Cal.), 25 F. Supp. 478, and authorities cited; FIELD v. WATERMAN STEAMSHIP CORPORATION (C.C.A. 5th Cir.), 104 F. (2d) 849; SWIFT & CO. v. YOUNG (C.C.A. 4th Cir.), 107 F. (2d) 170, 172; ATWATER v. NORTH AMERICAN COAL CORP'N (C.C.A. 2nd Cir.), 111

F. (2d) 125; COLLINS v. METRO-GOLDWYN-MAYER PICTURES CORP'N (C.C.A. 2nd Cir.), 106 F. (2d) 83, 86; BARTIN v. CONNECTICUT GENERAL LIFE INSURANCE CO. (Dist. Ct. Neb. Dist.), 25 F. Supp. 579).

(4) By the contract provisions of the assignment from Houston to Southern Alkali, the former was given the right to complete a gas well only in the event, as a result of its operations, it should discover gas in a well drilled by it *in an unsuccessful effort to complete a commercial oil well.* The importance to both parties of the right of Houston to complete gas wells is clearly indicated by the fact that they were strictly limited to five in number and by the conclusion reached by the Court of Appeals that the products of such five wells should be forfeited by Southern Alkali to Houston in the event Southern Alkali failed to take over such wells. Houston wanted the privilege to complete such wells; Southern Alkali wanted such privilege strictly limited both as to number and conditions upon which they might be completed. Southern Alkali insisted upon such limitations because the forfeiture of the products therefrom to Houston (which might result in the complete exhaustion of its gas reserves) could have been prevented only by paying the cost of drilling and equipping such well to the producing horizon. This being true, it seems clear that the parties contemplated that Houston should not be permitted to complete any well drilled by it as a gas well simply because it had unsuccessfully explored sands below the gas producing horizon in search of oil, but only after it had also unsuccessfully explored sands above as well. In this instance, as shown by the undisputed testimony, Respondents made no effort to complete the well as an oil well in three or more known shallower oil producing sands. In other words, they not only did not discover gas from the well in question in an unsuccessful effort to produce oil, but they willfully completed the well knowing that shallower sands existed in any one of which

they could have completed, but made no effort to complete, a commercial oil well. In this situation, assuming that Respondents were, by assignment, vested with the rights of Houston, they have utterly failed to show compliance with the conditions of the contract by which the title to gas from the well in question, if it be a gas well, should be forfeited by Petitioner to them.

If, in its drilling operations, Houston drilled a well that could be completed either as a commercial oil well or a commercial gas well, the contract provisions of the assignment did not give Houston the privilege of electing to complete it as the one or the other, because its right to complete gas wells was limited to those instances in which gas was discovered *"in an unsuccessful effort to complete a commercial oil well."* It follows that if Houston, in its operations, as was the situation in the instant case, drilled through three or four oil sands, in any one of which a commercial oil well could have been completed, and though one gas sand in which a commercial gas well could have been completed and thereafter prosecuted its drilling operations to a greater depth in an effort to find a more productive oil sand but, due to mechanical difficulties, was unable to complete an oil well at such lower depth, Houston, having closed off the lower part of the hole, would not have the right to elect whether it would perforate the casing in the gas sand and complete the well as a gas well or perforate the casing at one of the shallower oil sands and complete the well as an oil well. The same is true of the rights of Respondents if the rights of Houston were assignable and were assigned to Respondents. Having found oil sands in this well, it was Respondent's duty to leave Petitioner's property undisturbed and to complete the well in one of the shallower oil sands that had been found and drilled through. It follows that the Court of Appeals was clearly wrong in holding that, simply because the drill was

twisted off at a lower depth than that at which the well was completed, the well was completed "in an unsuccessful effort to complete a commercial oil well" and therefore drilled and completed in compliance with the conditions giving Houston the right to drill and complete such well as a gas well and take the products therefrom in the event Southern Alkali failed to take it over.

(5) The contract provision of the assignment from Houston to Southern Alkali, by which Houston was given the right to complete five gas wells was not assignable: (a) Because by the language of such contract provision the right to complete five gas wells was restricted to Houston and was not extended to its "*assigns*" as was true of the correlative right of Southern Alkali to complete oil wells under such contract provision; (b) Because the duty imposed upon Houston to complete five gas wells under the conditions expressed in the contract provision and to permit Southern Alkali to take over such wells by paying the cost *actually incurred* "in drilling and equipping said gas well, exclusive of any overhead charges and exclusive of *any drilling cost below the producing horizon*," conferred special privileges and responsibilities upon Houston, involving its special skill, integrity, credit and responsibility, in reliance upon which Southern Alkali reposed special trust and incurred substantial risk. The Court of Appeals, in holding that such contract right to complete five gas wells was assignable by Houston to Respondents, Simmons and Webb, has decided an important question of general law, particularly affecting the entire oil and gas producing industry, which is probably untenable.

(6) Respondents have only such rights in the 333-acre Harrell tract as passed to them by the assignment from Houston of the leasehold oil rights in a portion of said land. The assignment is limited to the "oil" rights under a portion only of the Harrell lease and a portion of the Lawrence lease,

Houston retaining the oil rights to the remainder of the six leases to which the contract provisions of the assignment of gas rights by Houston to Southern Alkali, dated April 5, 1932, related. The majority holding by the Court of Appeals that the rights of Houston, under the contract provisions of said assignment, to drill not exceeding five gas wells were assigned by it to Respondents Simmons and Webb by the assignment dated January 6, 1938, is incorrect, and in so holding the majority of the Court of Appeals has decided an important question of general law, particularly affecting the entire oil and gas producing industry, which is probably untenable and in conflict with the weight of authority.

(7) The Court of Appeals construed the contract provision of the assignment dated April 5, 1932, as to taking over gas wells by Southern Alkali, merely to afford a simple option right of which time is the essence, rather than as a provision whereby Southern Alkali, or its assigns, as the owner of the gas in place by failure to take over the well would forfeit its title to such gas. On that erroneous construction of the nature of the contract provision as to taking over gas wells, for the sole reason that Petitioner did not offer to take over the well within forty (40) days, the Court of Appeals held that "It is unnecessary to inquire whether the further finding of the District Court was correct, that the option right was waived by Southern and the waiver was converted into an estoppel because Simmons and Webb made contracts and substantial expenditures on the faith of Southern's statement that it did not wish the well." Had the Court of Appeals properly construed the contract as a provision for forfeiture, decision as to questions of waiver and estoppel, and as to whether forfeiture resulted from such facts, would have been required because the equitable rules governing questions of forfeiture impose the burden of proof

upon the party asserting the forfeiture to have occurred; and the rule as to simple options, upon which the court based its opinion, would not have been applicable. Accordingly, the Court of Appeals has held that Petitioner has forfeited its valuable property rights in gas in place upon inapplicable and erroneous rules of construction and has decided an important question of general law probably untenable and in conflict with the weight of authority, and an important question of local law contrary to a decision of the Supreme Court of Texas as expressed in JONES v. GIBBS, 133 Tex. 627, 130 S.W. (2d) 268, and at variance with and contrary to a decision of the Circuit Court of Appeals for the Tenth Circuit as expressed in GLOYD v. MID-WEST REFINING COMPANY, 62 Fed. (2d) 483.

Prayer for Writ

WHEREFORE, Petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, commanding said Court to certify and send to this Court on a day certain to be named therein, a full and complete transcript of the record and the proceedings had in said Court in the case numbered and entitled on its docket No. 9183, SOUTHERN MINERALS CORPORATION, APPELLANT v. JAY SIMMONS, ET AL., APPELLEES, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States and that the judgment of the Circuit Court of Appeals and of the District Court be reversed by this Court and judgment rendered for Petitioner granting the injunction and damages as prayed, or in the alternative, that the cause be remanded to the Circuit Court of Appeals for a more complete statement of the facts as found by that Court and conclusions

upon which its judgment was based, and for such other relief as to this Honorable Court may seem right and proper.

DATED this 5th day of September, A.D. 1940.

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